No. 96-1866

In The

Supreme Court of the United States

October Term, 1997

ALIDA STAR GEBSER and ALIDA JEAN McCULLOUGH,

Petitioners,

vs.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF ON THE MERITS FOR PETITIONERS

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SUMMARY OF ARGUMENT IN REPLY

The question in this case is under what circumstances a federally funded school district is liable under Title IX for its failure to protect a minor student from her teacher's intentional sex discrimination, in the form of sexual harassment. This is the sole question that remains open after the Court's decisions in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). Together those cases establish: (1) that an implied right of action exists for violations of Title IX, *Cannon*, 441 U.S. at 705-06; (2) that monetary damages are available for intentional discrimination under Title IX, *Franklin*, 503 U.S. at 74-75; and (3) that sexual harassment of a student by a teacher is intentional discrimination of the sort for which damages are available. *Id.* (*citing Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

There is no question that Petitioner was subjected to intentional sex discrimination by her teacher. Under *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), this fact disposes of any Spending Clause objection to the award of damages. The only question is whether the school district is liable for that discrimination. Respondent's long disquisition on the nature of Spending Clause statutes is thus beside the point. Its painstaking analogy to Title VI, in particular, leads nowhere, for Respondent points to no Title VI decision refusing to hold a funded program liable for intentional discrimination by an agent of the program. Respondent's Spending Clause argument and its Title VI analogy serve mainly to confuse the issue by conflating two distinct inquiries: was Gebser subjected to intentional sex discrimination? and, is the school district responsible for failing to protect Gebser from that discrimination? Once these two questions are properly disentangled, most of Respondent's arguments fall by the wayside.

On the question of the school district's responsibility for its teacher's intentional sexual harassment, it is useful to anchor the analysis by way of a comparison to Title VII, under which the issue of enterprise liability has been extensively litigated and is now before the Court in *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), *cert. granted*, 118 S. Ct. 438 (1997). It is useful *not* because the language of Title IX closely parallels that of Title VII, but because the *differences* between Title IX and Title VII cut in favor of broader enterprise liability under Title IX.

Every antidiscrimination statute must, to be meaningful, reach the acts of subordinate officials; it is almost always subordinate officials who do the discriminating that these statutes set out to prohibit. The question is how, and how broadly, that is done. Title VII does so by defining "employers," who are prohibited from discriminating, to include "agents of employers." 42 U.S.C. § 2000e(b). Title IX does so by providing that no person "shall, on the basis of sex, be subjected to discrimination under" funded programs rather than "by" funded programs. The breadth of Title IX's basic injunction thus makes unnecessary the express inclusion of "agents" by which Title VII extends its antidiscrimination mandate to those who actually carry out all forms of discrimination within the organization.

Based on the text, context, and purpose of Title IX, we argue that the Fifth Circuit's actual notice standard of liability for sexual harassment is misconceived. Actual notice of and failure to redress harassment is only one basis for school district liability. A school district has failed to discharge its Title IX responsibility, and should be liable for teacher harassment: (a) where it knew or should have known that harassment was taking place, *or* failed to afford adequate procedures for preventing, discovering, and remedying harassment; or (b) where it placed the teacher in a position of authority over the victim that aided the teacher in carrying out the harassment. Most of Respondent's arguments both for actual notice liability and against any broader standard of liability stand or fall with its interpretation of Spending Clause requirements, to which we will turn first in Part I. Once the Spending Clause argument is disposed of, the "actual knowledge" standard collapses, for, as we discuss in Part II, it cannot be reconciled with the text and purpose of Title IX. Most of Respondent's remaining arguments boil down to two: "unfair surprise" and "the floodgates of litigation." We will return to these arguments, and to the appropriate standards of liability, below in Parts III and IV.

It should be borne in mind throughout the analysis that, notwithstanding Respondent's argumentative recitation of the facts, this case was resolved against Petitioner below on Respondent's motion for summary judgment; all disputed issues of fact must therefore be resolved against Respondent. *See General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997).

I. DAMAGES ARE AVAILABLE UNDER TITLE IX NOT ONLY FOR A SCHOOL DISTRICT'S OWN INTENTIONAL DISCRIMINATION BUT FOR A SCHOOL DISTRICT'S FAILURE TO PROTECT INDIVIDUALS FROM INTENTIONAL DISCRIMINATION UNDER ITS PROGRAMS.

Respondent's argument for upholding the Fifth Circuit's "actual notice" standard for school district liability rests almost entirely on its erroneous Spending Clause analysis.[1] Respondent argues at great length

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1. This Court has reserved the question whether Title IX is based solely on Congress' Spending Clause power, or is based as well on Congress' power under Section 5 of the Fourteenth Amendment. *See, e.g., Franklin*, 503 U.S. at 75 n.8. In a case involving a claim of Eleventh Amendment immunity, in which the source of congressional power was critical under *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), a panel of the Seventh Circuit recently determined that Title IX was enacted under Section 5 as well as the Spending Clause. *See Doe v. University of Illinois*, Nos. 96-3511 and 96-4148, 1998 U.S. App. LEXIS 3881 (7th Cir., Mar. 3, 1998), slip op. at 12; *see also Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997). *But see Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997) (treating Title IX as Spending Clause legislation); *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1398 n.12 (11th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 75-843). The Seventh Circuit's *Doe* decision partially undermines the reasoning of the earlier panel decision in *Smith v. Metropolitan School District*, 128 F.3d 1014 (7th Cir. 1997), on which Respondent relies here. The *Smith* panel, following *Rosa H.*, grounded its conclusion that a school district could be liable under Title IX only for its own intentional discrimination, and its adoption of the "actual knowledge" standard for liability in teacher harassment cases, in part on its treatment of Title IX as Spending Clause legislation. *Id.* at 1028-33. Neither *Smith* nor *Rosa H.* considered the possible Section 5 basis for Title IX (though *Smith* relied in turn on *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996), which did briefly consider and reject the proposition that Title IX was also Section 5 legislation. *Id.* at 1012 n.14).

It is not clear that the Court needs to decide whether Title IX is Section 5 legislation or only Spending Clause legislation to resolve this case. Respondent invokes the purported Spending Clause basis of Title IX for two related purposes: to support its claim that a school district can be

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that Title IX, like Title VI, is based on Congress' Spending Clause power, and that monetary damages are therefore available only in cases of intentional discrimination. *See* Br. of Resp. at 10-28. But the Spending Clause argument is quite beside the point. Gebser was clearly subjected to intentional discrimination by Respondent's agent; the question here is under what circumstances the school district is liable for having failed to prevent or remedy that intentional discrimination.

1. Respondent's laboriously developed analogy to Title VI, and its invocation of *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983), is a red herring — one that *Franklin* has already disposed of. Five members of the Court in *Guardians* concluded that there could be no damages remedy under Title VI in the absence of intentional discrimination.[2] But that decision in no way supports the Respondent's argument here.

The issue in *Guardians* was whether Title VI authorized damages for *unintentional* discrimination based on a disparate impact theory — that is, in a case in which *no* actor was shown to have engaged in intentional discrimination. This case, like *Franklin*, clearly involves

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liable only for its own intentional discrimination, and to fortify its claim of "unfair surprise" by reference to the "contractual nature" of Spending Clause legislation. Br. of Resp. at 23-24. As we explain below, however, *Franklin* disposes of the first claim, even on the assumption that Title IX is only Spending Clause legislation; the Section 5 argument would simply hammer another nail in the coffin. The related claim of "unfair surprise" is simply unconvincing given the history of Title IX regulations and precedents that predated the incidents at issue here. *See infra* p. 13.

2. In *Guardians*, Justice White provided the fifth vote for each of two propositions: (1) that unintentional discrimination was actionable under Title VI, 463 U.S. at 593; and (2) that damages were nonetheless unavailable for such unintentional violations, *id.* at 603. Four Justices concluded that unintentional discrimination was not actionable at all under Title VI. *See id.* at 610 (Powell, J., concurring in the judgment); *id.* at 612 (O'Connor, J., concurring in the judgment). Four other Justices agreed with Justice White that Title VI (or valid regulations promulgated under Title VI) did reach unintentional discrimination, but concluded, contrary to Justice White, that damages were available for such violations. *See id.* at 615 (Marshall, J., dissenting); *id.* at 639, 645 (Stevens, J., dissenting).

intentional discrimination in the form of sexual harassment by a teacher with extensive responsibility for Gebser's education and authority over her.[3] In such a case, *Franklin* indicates that the intentional nature of the agent's conduct satisfies any Spending Clause objection to the award of damages.[4] *Franklin* has disposed of the Spending Clause issue, and has implicitly rejected the proposition that a school district can be liable in damages only for its *own* intentional discrimination.

2. *Franklin*'s resolution of the issue — that a school district may be liable under Title IX for intentional discrimination by its teachers without itself intending to discriminate — is entirely consistent with the language and purposes of Title IX.

a. Title IX does not simply prohibit discrimination *by* the school district; it protects individuals from being subjected to discrimination "under" a funded program or activity. This language supports broader school district liability under Title IX than Title VII, which reaches only discrimination *by* employers and their agents, supports in the workplace.

Title IX is notable for the breadth of its language, on which the Court has had occasion to remark previously.[5] The statute has three distinct and specific clauses. Under Title IX, no person "shall, on the basis of sex, [1] be excluded from participation in, [2] be denied the benefits of, or [3] be subjected to discrimination under any [federally funded] education program or activity. . . ." While the first two of those clauses would often result from official or quasi-official action by the school district itself, most discrimination — and all sexual harassment discrimination — is performed by some human actor, and almost always by some human actor below the managerial level. The text of Title IX

3. Respondent seeks to minimize the significance of *Franklin* by pointing to the plaintiff's allegation that the school district had actual knowledge of the harassment and failed to take remedial action. *See* Br. of Resp. at 27-28. But nothing in the Court's discussion of the Spending Clause issue alludes to this allegation or suggests that it was necessary to its conclusion, *Franklin*, 503 U.S. at 74-75; at most, one could surmise that the Court deemed a showing of actual knowledge to be *sufficient* to establish liability.

4. *See Franklin*, 503 U.S. at 74-75.

5. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982).

clearly aims to reach beyond official policies of exclusion or discrimination.

Moreover, Title IX, unlike Title VII, affects only entities that have accepted the benefits of federal funding. It should not be surprising that recipients of federal funds are required to undertake *broader* responsibility to prevent intentional discrimination within their programs than is imposed on essentially all employers through a comprehensive regulatory statute such as Title VII.[6]

Respondent argues that our construction of the statute is so broad as to impose "an impossible burden and one that Congress could not have intended . . ." Br. of Resp. at 13. But we did not draft and enact Title IX; Congress did. And as the Court observed quite recently, "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so. . . ." *Brogan v. United States,* 118 S. Ct. 805, 811-12 (1998).

b. The purpose of Title IX would be defeated by Respondent's construction of the statute. If only intentional discrimination perpetrated by the school district gave rise to an action for damages under Title IX, the statute's private right of action against sexual harassment, upheld in *Franklin*, would be a dead letter.

Sexual harassment is never carried out by the school district itself, and almost never by the school district's managerial officials, who have little or no contact with students. Indeed, if only intentional discrimination by the school district, through responsible managerial officials, were actionable, damages would have been unavailable in *Franklin* itself,

6. Respondent's Spending Clause argument is premised on the assumption that liability under Spending Clause legislation must necessarily be narrower than liability under a regulatory statute such as Title VII. At the heart of the Court's Spending Clause jurisprudence, however, is the proposition that liability attaching to the receipt of federal funds is contractual in nature. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), thus held that any conditions on federal funding must be clearly stated. *Id.* at 17. But that being said, Congress can certainly choose to condition the benefits of federal funding on a higher standard of care toward the ultimate beneficiaries of that funding than, for example, is required of all employers regardless of their receipt of federal funds. The inescapably broader language of Title IX as compared to Title VII suggests that Congress did exactly that.

and would be unavailable in a case meeting the Fifth Circuit's actual notice standard. For knowing of discrimination and failing to remedy it is not the same as intentionally discriminating (though it is certainly allowing persons to be, "on the basis of sex, . . . subjected to discrimination"). An "equal opportunity ignorer" does not intentionally discriminate on the basis of sex.[7] So if Respondent's analysis were accepted, there would essentially never be liability for sexual harassment under Title IX. The Court's decision in *Franklin* requires that this interpretation be rejected.

c. Ironically, Respondent's attempt to render the "actual knowledge" standard more palatable demonstrates the error in its argument. Respondent implicitly recognizes that a true "actual knowledge" standard would set a ridiculously high threshold for school district liability. But we are not to worry, says Respondent: School district officials need not be actually aware of harassment, and then fail to act; they must only be actually aware of a *substantial risk* that harassment is taking place. *See* Br. of Resp. at 29. It is impossible, however, to characterize a school district's actions in such a case — ignoring a substantial risk that harassment is occurring — as "intentional discrimination"; its conduct would be at most "reckless" with respect to the underlying harassment. Under Respondent's Spending Clause argument, then, there could be no liability in such a case. But the problem lies not with Respondent's attempt to soften the "actual knowledge" standard; it lies in the misdirected effort to attach the "intentional discrimination" requirement to the school district's own conduct rather than to the underlying act of discrimination, as *Franklin* indicates we should do.

7. Even the highly restrictive standard of the Eleventh Circuit in *Floyd v. Waiters*, No. 94-8667, 1998 WL 17093 (11th Cir., Jan. 20, 1998), which held that "the superintendent or the board must have actual knowledge of the sexual harassment and then fail to take reasonable steps to end the abuse," *id.* at *4, would seem to fall short of requiring *intentional discrimination* by the school district. Thus, the logical implications of the "intentional discrimination by the school district" argument are perhaps only followed by *Rowinsky v. Bryan Independent School District,* 80 F.3d 1006 (5th Cir.), *cert. denied,* 117 S. Ct. 165 (1996), which held that a school district was liable under Title IX for peer harassment only if it treated discrimination complaints by girls differently than it treated complaints by boys. *Id.* at 1016.

II. WITHOUT THE ERRONEOUS PREMISE THAT DAMAGES ARE AVAILABLE ONLY FOR THE SCHOOL DISTRICT'S OWN INTENTIONAL DISCRIMINATION, THE FIFTH CIRCUIT'S ACTUAL NOTICE STANDARD OF SCHOOL DISTRICT LIABILITY FOR INTENTIONAL SEXUAL HARASSMENT IS INDEFENSIBLE.

Once we dismantle Respondent's Spending Clause argument, its defense of the "actual knowledge" standard collapses. Neither the language of the statute nor the Court's prior decision in *Franklin* can be read to support such a narrow standard of school district liability for intentional discrimination by teachers. Moreover, the actual knowledge standard would undermine the purposes of Title IX by establishing inadequate incentives to police against sexual harassment.

An "actual notice" standard creates no incentive for a school district to guard against sexual abuse by teachers because the school district could avoid liability by avoiding knowledge of harassment. Respondent essentially concedes this, but seeks to deflect the point by arguing that other laws — Section 1983 or state tort law — can be relied upon to provide proper incentives. Br. of Resp. at 31. But these alternate remedies are chimerical, as Respondent well knows. Under Section 1983, for example, a plaintiff must show that the school district manifested "deliberate indifference" toward the plaintiff's right to be free of harassment. *See, e.g., Doe v. Taylor Independent School District*, 15 F.3d 443, 445 (5th Cir.), *cert. denied*, 513 U.S. 815 (1994). The Texas Tort Claims Act absolutely immunizes school districts from tort liability except in cases involving motor vehicle accidents.[8] Neither of these laws do anything to encourage school districts to make themselves aware that sexual harassment is occurring.

But even aside from the high threshold set by these laws, it is Title IX that seeks to eliminate sex discrimination and sexual harassment in schools. It makes no sense to justify a toothless interpretation of Title IX by reference to other laws that were not specifically designed to address either sex discrimination or discrimination in schools and that apparently were not adequately addressing the problems that Title IX was meant to redress.

8. Tex. Civ. Practice & Rem. Code, § 101.051.

It is striking to compare the "actual notice" standard for school district liability for teacher harassment of school children with the "constructive notice" standard that the Fifth Circuit imposes under Title VII, and that Respondent acknowledges might be appropriate for employment discrimination claims under Title IX. Br. of Resp. at 18. Under Respondent's view of Title IX, school districts would have a broader responsibility and a greater incentive to protect their adult employees from harassment than they would have to protect minor school children from harassment and abuse. How can this be the proper interpretation of a statute that aims to ban sex discrimination in schools? We think it cannot be.[9]

III. A SCHOOL DISTRICT SHOULD BE LIABLE FOR ITS TEACHER'S INTENTIONAL SEXUAL HARASSMENT IF THE SCHOOL DISTRICT KNEW OR SHOULD HAVE KNOWN OF THE HARASSMENT OR FAILED TO AFFORD ADEQUATE PROCEDURES FOR THE PREVENTION, DISCOVERY, AND REDRESS OF HARASSMENT.

A. A school district should be liable, at a minimum, if responsible officials knew *or should have known* of harassment and failed to take appropriate steps to remedy it.[10] Several circuits have so held, contrary to the Fifth Circuit.[11] But this case raises the question whether a school

9. While putting most of its eggs in the Spending Clause basket, Respondent also seeks to justify an "actual notice" standard on functional grounds, arguing that any broader standard of liability will create its own bad incentives — that is, either to overmonitor teachers or to reject federal monies. We will address these contentions in Parts III and IV below.

10. As recited in our opening brief at 7-8, the evidence raises a material dispute of fact as to whether Respondent should have discovered Waldrop's harassment of Gebser. *See also* Br. for United States at 27-28. It might have discovered it by investigating the complaints that Waldrop's principal did receive, for those complaints stemmed from sexual innuendo in a class of two students, including Gebser. J.A. 90a-93a. As Gebser said, "I think that they should have noticed that he was spending way too much time with me. . . . In retrospect, I think that they — I mean, this should have been setting off sirens in their heads." J.A. 61a.

11. *See, e.g., Kracunas v. Iona College*, 119 F.3d 80, 88 (2d Cir. 1997); *Doe v. Claiborne County*, 103 F.3d 495, 513-14 (6th Cir. 1996); (Cont'd)

district that has failed to put in place procedures designed to bring to light incidents of harassment can escape liability by asserting its ignorance of the harassment.

Because sexual harassment in schools is invariably carried out not by top school officials but by those who have direct contact with students, the prevention of harassment depends heavily on the school district's maintenance of adequate procedures for the prevention and redress of harassment. This is why the Department of Education has long required school districts that receive federal funds to adopt and publicize to all their students a policy against sexual harassment and other discrimination and grievance procedures that would allow students, without fear of reprisals, to apprehend and report incidents of sexual discrimination and harassment to school officials. 34 C.F.R. § 106.9.

The failure to institute these long-required procedures constitutes a basic violation of the statutory duty to protect students from intentional discrimination under the educational program. A school district should thus be liable for its teacher's sexual harassment of students if it knew or should have known that the abuse was taking place *or if it failed to afford adequate procedures for the prevention, discovery, and redress of sexual harassment*, as long required by federal regulations as a condition of receiving federal funds. *See Kracunas v. Iona College*, 119 F.3d 80, 86 (2d Cir. 1997). An educational institution that has failed to abide by these clear conditions of federal funding should not be afforded a defense of ignorance.

There is ample evidence that Respondent failed to comply with the conditions of federal funding. Its brief refers to the existence of sexual harassment policies that, on a fair reading of Superintendent Collier's testimony, never saw the light of day. Collier's testimony indicates that no policy against sexual harassment, procedures for making a harassment complaint, or assurances against reprisals were ever communicated to teachers or students, or that she was even aware that this was required.[12]

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Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995).

12. This was, according to Collier, "a campus issue" for which the Respondent school district took no responsibility. J.A. 72a. (Nor is there (Cont'd)

There is, at a minimum, a genuine dispute about these issues so as to make summary judgment inappropriate.

The fact that some resourceful parents complained to the principal when their daughters were subjected to Waldrop's inappropriate behavior is hardly evidence that there were adequate procedures in place. (And again, even if it were, it would succeed only in raising a material dispute for trial.) There is simply nothing to suggest that these parents were aware of any policy or procedure; they simply took action on their own. J.A. 90a-93a. Nor is there any indication that the principal was following any specified procedure; indeed, he failed to make any record of the complaint, or to report the complaint to Collier, the Title IX coordinator, until after Waldrop's arrest (J.A. 78a-82a); his "investigation" consisted of hearing Waldrop's denial of any offensive intent. J.A. 78a-80a. Obviously we do not suggest that the Court should resolve these factual issues; the point is that there is more than enough evidence to raise an issue for trial under this standard of liability.

Under the terms on which it received federal funds, Respondent was clearly required to maintain written policies and complaint procedures, and to publicize them to students. A school district that fails to comply with these clear and longstanding conditions on the receipt of federal funding should not be heard to object to liability for the intentional sexual misconduct of its teacher on the ground that it could not have known that harassment was taking place.[13] Yet that is essentially what Respondent seeks to do here.

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any evidence that these required actions were taken at the campus level by the principal.) Indeed, Collier, who was at that time the Title IX coordinator for Respondent, revealed in her deposition that she was simply unaware of any Department of Education regulations requiring Respondent to maintain and disseminate to students a complaint procedure. J.A. 72a-73a.

13. *Cf. Meritor*, 477 U.S. at 73 ("Petitioner's contention that respondent's failure [to put it on notice of harassment] should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward"). Nor should they be heard to claim, as Respondent does here, that these required procedures would not have been effective had they been in place, because the Petitioner would not have utilized them. *See infra* pp. 14-15.

B. Putting aside its half-hearted defense of the adequacy of its procedures, Respondent objects to liability based on the *in*adequacy of its procedures on three grounds: (1) failure to afford adequate procedures is at most negligent, and does not constitute intentional sex discrimination by the school district; (2) Department of Education regulations do not provide, and the school district was not on notice, that violation of those regulations would give rise to liability for damages; (3) any shortcomings in Respondent's grievance procedures made no difference because Petitioner knew that Waldrop's conduct was wrong but was determined to keep it secret.

Each of these objections fails, as we will demonstrate below. But before turning to these objections, it is worth noting one objection that Respondent does not make in relation to the "inadequate procedures" basis for liability: Respondent does not claim, and could not claim, that imposing liability on this basis will leave school districts defenseless against a flood of litigation. Whatever may be the reasonableness or the relevance of Respondent's fears about depleting school budgets or provoking recipients to refuse federal funds, neither of those concerns is implicated by the proposed procedural basis for school district liability. School districts can obviously avoid liability on this basis by complying with federal law and instituting adequate procedures.

1. Respondent's first objection — that liability for lack of procedures would be based on negligence, not intentional discrimination — falls with Respondent's Spending Clause argument: The failure to maintain adequate procedures — to publicize the policy against harassment, the nature of the conduct that is prohibited, the availability of a grievance procedure, and assurances against reprisals — may not itself constitute intentional sex discrimination. But that is, again, beside the point, for Petitioner suffered intentional sex discrimination at the hands of Respondent's agent, Waldrop. The question now is whether there is an adequate basis for holding Respondent liable for that discrimination. Respondent's failure to comply with federal regulations that are designed to afford victims of harassment the information and redress they need constitutes a violation of the conditions of federal funding and a failure to protect Gebser from intentional harassment by its agent under its programs. It is an entirely reasonable basis for liability under the statute.

2. Respondent's claim of "unfair surprise" is unconvincing. What is the source of Respondent's surprise? It cannot be the requirement to maintain and publicize procedures for dealing with complaints of discrimination; such requirements have been in place since 1975,[14] have been imposed as a condition of all federal funding received by Respondent since then, and have nonetheless been ignored. It cannot be the fact that individuals subjected to sex discrimination have a private cause of action against the school district for Title IX violations; the Court so ruled in *Cannon* in 1979. It cannot be that damages are available in private actions based on intentional discrimination, or that sexual harassment is a form of intentional discrimination for which damages are available under Title IX; this Court unanimously decided those questions in *Franklin* in February, 1992, before Waldrop crossed the line from inappropriate verbal approaches to sexual abuse.[15]

At bottom, Respondent's claim of surprise is this: It did not realize that its blatant disregard of the conditions of its federal funding — conditions designed to prevent, discover, and redress sexual harassment — could render it liable for a teacher's intentional sexual harassment of a minor student under its supervision and care — harassment which it failed to prevent, discover, or redress. In light of its acceptance of federal funds with clear conditions attached, Respondent must accept the consequences of its refusal to comply with its contractual obligations.

3. Respondent seeks to escape responsibility for its failure to establish adequate procedures by claiming that such procedures would have made no difference in this case. Petitioner cites evidence that Gebser knew that Waldrop's conduct was wrong but was unwilling to report him. *See* Br. of Resp. at 38-39. There are two problems with this argument: First, it ignores contrary evidence — evidence that creates at least a material dispute of fact — that Gebser would have availed herself of an avenue of redress had it been available when she needed it. *See, e.g.*, J.A. 56a-57a; 63a. Second, it injects a counterfactual inquiry that

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14. 40 Fed. Reg. 24,139 (1975).

15. Moreover, the *Franklin* decision simply applied the "normal presumption in favor of all appropriate remedies," *Franklin*, 503 U.S. at 74, and recognized that Congress had implicitly acknowledged the availability of damages under Title IX. *Id.* at 72; *see also id.* at 78 (Scalia, J., concurring in the judgment).

should simply not be relevant; Respondent should be, in effect, estopped from claiming that its wrongful omissions were harmless.

First, on the facts: There is evidence that, at some points in the abusive relationship between Waldrop and Gebser, Gebser was aware that Waldrop's conduct was wrong but was unwilling to come forward with a complaint. She was unwilling to do so because, once the misconduct escalated into a full-blown sexual "affair," Gebser felt "ashamed," "bewildered," "terrified," "depressed," and pressured by Waldrop to keep quiet about their conduct, J.A. 64a-65a, and because she perceived that she would be unable to have him as a teacher if she did not submit to his sexual impositions and keep them secret. J.A. 62a.

This evidence reinforces the extent to which Waldrop manipulated Gebser and used his authority as her teacher to accomplish and hide his harassment of her. But it does not remotely establish that adequate sexual harassment policies and procedures would have made no difference. For there is also evidence that, earlier in Waldrop's illicit sexual pursuit of Gebser, she was naive, uninformed about the nature of sexual harassment, and bewildered about what she should do about it. J.A. 57a-58a, 63a. She testified, "If I had known at the beginning what I was supposed to do when a teacher starts making sexual advances towards me, I probably would have reported it." J.A. 64a. Respondent did nothing to help Gebser to recognize Waldrop's illicit pattern of conduct, and to call him on it, before she was in thrall to him. At a minimum, there is a genuine dispute of fact as to whether adequate procedures would have made a difference in this case.

But Respondent's one-sided recitation of the facts serves to illustrate why this counterfactual inquiry should have no place in the determination of Respondent's liability. A young victim of sexual abuse may often be pressured, manipulated, and confused into silence. The procedures required by federal regulations are designed to cut short this dynamic of manipulation and to give the victim a way out before it is too late. Moreover, an effectively communicated policy against sexual harassment, along with a well-advertised complaint procedure, may well deter a teacher from engaging in inappropriate behavior. Respondent's failure to comply with those requirements inevitably creates uncertainty about whether appropriate procedures would have accomplished their

objectives; Respondent should not gain the benefit of that uncertainty.[16] *Having inexcusably failed to institute adequate procedures to prevent, discover, and redress sexual discrimination and harassment, Respondent should not be able escape responsibility for sexual harassment that it failed to prevent, discover, or redress.*

IV. A SCHOOL DISTRICT SHOULD BE LIABLE FOR ITS TEACHER'S INTENTIONAL SEXUAL HARASSMENT OF STUDENTS IF THE TEACHER WAS AIDED IN CARRYING OUT THE HARASSMENT BY THE AUTHORITY GRANTED TO HIM BY THE SCHOOL DISTRICT OVER THE STUDENT VICTIM.

A. Respondent apparently acknowledges that there is at least a material factual dispute on the critical role of the student-teacher relationship in enabling and sustaining the unlawful conduct. Respondent admits, for example, that "Gebser agreed to conceal the affair because she knew that she would no longer have Waldrop as a teacher if the relationship were exposed." Br. of Resp. at 4. Respondent makes no reference to Gebser's undisputed testimony that, while they never had sexual intercourse at the school, Walrop accosted Gebser, and arranged these incidents, at the school and during the school day, and that the cover for these incidents was Waldrop's role as her one-on-one advanced placement teacher in "psychology" or the like. J.A. 60a-61a. Waldrop was granted extraordinary one-on-one control, without any supervision or accountability, over Gebser's education. There is thus ample evidence that Waldrop was aided in carrying out his harassment of Gebser not only by the proximity to Gebser that followed from his

16. The Government contends for a constructive notice standard under which Respondent's lack of procedures would be highly relevant to the determination of whether Respondent knew or should have known of harassment. *See* Brief For The United States as *Amicus Curiae* Supporting Petitioners at pp. 16-17. This standard may open up the hypothetical inquiry sought by Respondent here, and may allow a school district to escape liability by eliciting damaging answers to "what if . . ." questions from the confused and guilt-ridden victim whom the school district failed to protect. We believe, along with the Second Circuit in *Kracunas, supra*, that it is more consistent with the statutory text and purpose to foreclose that inquiry in the case of a school district that has failed even to institute the required procedures.

teaching job, but by the extraordinary educational authority granted to him by the school district over Gebser.

Should liability attach to the principal when the unlawful conduct stems directly from the authority entrusted to the agent? We argue that it should, *not* because Title IX precisely parallels Title VII, in which agency standards apply, but because this particular common law agency standard, drawn from Restatement (Second) of Agency § 219(2)(d), resonates fully with the statutory language and purpose of Title IX: A teacher's intentional harassment of a minor school child that is carried out using the authority granted by the school district is intentional discrimination "under" a federally funded educational program.

As compared to the young victim, the school district has superior means of guarding against this sort of abuse of authority. The school district can screen employees, supervise them, give them incentives to abide by the law, and, most importantly, institute policies to prevent, uncover, and redress harassment. In view of the Respondent's failings on this score, its protests against what it claims will be open-ended and uncontrollable liability ring hollow. School districts should be given a strong incentive to police against teachers' abuse of their authority over students to carry out intentional harassment and other discrimination against them.

B. Respondent raises three basic objections to this standard of liability: (1) that the proposed standard of liability is broader than the standard of agency law in Restatement (Second) of Agency § 219(2)(d) from which it is derived; (2) that it amounts to the imposition of "strict liability"; and (3) that this so-called "strict liability" standard would expose school districts to a crippling flood of litigation and produce counterproductive incentives. None of these objections is valid.

1. Respondent contends that Restatement (Second) of Agency § 219(2)(d), even if it were an appropriate standard of liability under Title IX, would not support liability here. *See* Br. of Resp. at 40-42. According to Respondent, that provision is narrower than its words suggest; it reaches only cases in which "the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided in him." Restatement (Second) of Agency § 261 (cited in comment (e) to § 219(2)).

But the case in which "the transaction seems regular" is only one of several examples of apparent authority under § 219(2)(d). Comment (e) goes on to state: "The enumeration of such situations is not exhaustive, and is intended only to indicate the area within which a master may be subjected to liability for acts of his servants not in scope of employment." And in the manner of common law principles generally, this one has come to be used in new contexts — specifically, the context of harassment and discrimination, in which § 219(2)(d) has frequently been found to justify enterprise liability for harassment by one of its agents.[17]

But more to the point, even if the school district would not be liable for Waldrop's conduct under a strict application of the common law of agency, that is hardly a decisive argument against imposing Title IX liability under a similar standard. Even under Title VII, which explicitly invokes the agency concept, the Court has acknowledged that "common-law principles [of agency] may not be transferable in all their particulars to Title VII." *Meritor*, 477 U.S. at 72. Even more so under Title IX, the question is what standard of liability — and what level of accountability — is appropriate under the statute.

As we set forth in our opening brief, the text and context of Title IX support holding school districts broadly liable for their teachers' abuse of authority in a case like this, in which a minor schoolchild was harassed by a teacher whom the Respondent put in charge of important parts of her education. "Abuse of authority" would not be a basis for liability in all cases of harassment by a school district agent; where the agency relation merely brought the perpetrator into contact with the victim, there would be no basis for school district liability under this principle. Similarly, this principle would rarely afford a basis for liability in the case of peer harassment. But in a case such as this, where the

17. *See, e.g., Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d. Cir. 1994), *cert. denied*, 512 U.S. 1213 (1994); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417, 1418 (10th Cir. 1987), *appeal after remand*, 928 F.2d 966 (1991); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558, 1559 (11th Cir. 1987); *Webb v. Hyman*, 861 F. Supp. 1094, 1108 (D.D.C. 1994); *Sims v. Montgomery County Comm'n*, 766 F. Supp. 1052, 1069, 1075, 1094 (M.D. Ala. 1990); *Maturo v. National Graphics, Inc.*, 722 F. Supp. 916, 924 (D. Conn. 1989); *Rauh v. Coyne*, 744 F. Supp. 1186, 1189-91 (D.D.C. 1990); *Champion v. Nationwide Sec., Inc.*, 450 Mich. 702, 545 N.W. 2d 596, 601 (1996).

school district's agent has been given extraordinary, unsupervised educational or disciplinary authority over the victim, and has been thereby aided in carrying out the harassment, the school district should be liable.

2. Respondent misses the mark when it characterizes the proposed standard as amounting to "strict liability." *See* Br. for Resp. at 44. Strict liability is liability without fault — liability that is imposed on a party regardless of fault for reasons of social policy. But there is no shortage of fault in this case. There is the blameworthy, intentional misconduct of Respondent's agent, Waldrop. Moreover, Respondent is hardly blameless in having placed Waldrop a position of extraordinary authority over Gebser, and enabled him to isolate the victim under cover of a one-pupil class. It is not "strict liability" to hold Respondent responsible for having thus aided Waldrop in perpetrating his escalating campaign of harassment.

3. In the final analysis, Respondent's argument against this agency standard issues from the last refuge of those seeking to restrict liability: when all else fails, point to the "floodgates," and the deluge of litigation that supposedly lies behind them. Respondent adds a twist: faced with a potential flood of costly litigation, school districts may reasonably respond in one of two harmful ways: They may decline federal funds, to the detriment of their pupils' education and of the statutory objective of combatting sex discrimination, in order to avoid Title IX liability entirely; or they may engage in intrusive and excessive oversight of teacher-student interaction in order to insure against improper conduct. *See* Br. of Resp. at 46-48.

Respondent's dire predictions rest on an entirely speculative claim about the likely volume of litigation concerning claims of teacher sexual abuse. No support is offered for these predictions.[18] Moreover, it is unable to point to a single decision in which a judgment of any size, much less one of ruinous proportion, was entered against a school district.[19] Indeed, there are many means of legal recourse against an

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18. *See Doe v. University of Illinois*, Nos. 96-3511 and 96-4148, 1998 U.S. App. LEXIS 3881 (7th Cir., March 3, 1998), slip op. at 25.

19. Respondent seeks to create the impression of open floodgates by its citation to *Canutillo Independent School District v. Leija*, 101 F.3d (Cont'd)

inappropriately large verdict, if one should be rendered.[20]

More importantly, Respondent's predictions rest on the assumption that school districts have no reasonable and effective means to prevent or address teacher harassment of students, and thus to avoid liability, at least under the agency standard.[21] But this assumption — essentially that the procedures that the federal government has long required and that conscientious school districts have long relied upon to prevent and redress harassment will not work, or will not work reliably enough — is entirely speculative. Certainly Respondent is in a poor position to assess the utility of reasonable procedures for the prevention, uncovering, and redress of harassment, for it had no such procedures.

Finally, in case school districts' conscientious enforcement of required procedures fails to prevent harassment, and in case their appeals to the judiciary fail to stem the tidal wave of damages that Respondent and its *amici* profess to fear, school districts can always turn to Congress. Congress has the power to limit damage recoveries, and has done so under other civil rights statutes. Thus, for example, actions arising under Title VII and the Americans with Disabilities Act[22] have damage "caps" that are finely calibrated, so that small companies are exposed to a

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(Cont'd)
393 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2434 (1997), which indeed involved a large verdict, but it fails to note that in *Canutillo* the district judge refused to enter a judgment on that verdict.

20. A district judge may simply refuse to enter a verdict and order a new trial, as was done in *Canutillo*, *supra*. A district judge is empowered to order a remittitur. If those protections are inadequate, a litigant may appeal and the circuit courts are empowered to order new trials or remittiturs. *See, e.g., Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176 (5th Cir. 1995); *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778 (5th Cir. 1983).

21. As noted above, the "floodgates" argument has no force against the modified constructive notice standard discussed above; the maintenance and use of adequate procedures will not only accomplish its central aim of preventing and redressing harassment; it will shield the school district from liability for harassment of which it neither knew nor should have known.

22. 42 U.S.C.A. § 12101.

maximum of $50,000 in nonpecuniary and exemplary damages, and the largest companies are exposed to a maximum of $300,000,[23] pursuant to the Civil Rights Act of 1991.

Respondents in *Cannon* made a similar "floodgates" argument against the recognition of an implied private cause of action under Title IX. *Cannon*, 441 U.S. at 709. The Court's answer is pertinent here:

> In short, respondents' principal contention is not a legal argument at all; it addresses a policy issue that Congress has already resolved.
>
> History has borne out the judgment of Congress. Although victims of discrimination on the basis of race, religion, or national origin have had private Title VI remedies available at least since 1965, . . . respondents have not come forward with any demonstration that Title VI litigation has been so costly or voluminous that either the academic community or the courts have been unduly burdened. Nothing but speculation supports the argument that university administrators will be concerned about the risk of litigation that they will fail to discharge their important responsibilities in an independent and professional manner.

Id. at 709-10. Respondent's argument here, too, is best directed to Congress. The speculative fear of costly litigation and liability is simply not a reason to cripple the effectiveness of Title IX as a remedy for sexual harassment by adopting a threshold of liability that will virtually never be met.

CONCLUSION

For the reasons set forth above and in our opening brief, Petitioners respectfully request that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed and that the case be remanded to the district court for further proceedings.

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23. 42 U.S.C.A. § 1981(b)(3)(A)-(D).

Respectfully submitted,

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